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No. 88-2062

In the Supreme Court of the United States

OCTOBER TERM, 1989

PATRICIA COTTON, PETITIONER

v.

PATRICK BABCOCK, DIRECTOR OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars Michigan citizens, in a federal court action under 42 U.S.C. 1983, from seeking the recovery of food stamp coupons previously withheld by Michigan state officials, allegedly in violation of the Food Stamp Act, 7 U.S.C. 2011 *et seq.*

2. Whether Congress intended to abrogate the Eleventh Amendment immunity of a State that accepts federal funds under the Food Stamp Act, 7 U.S.C. 2011 *et seq.*, with respect to actions for recovery of food stamps coupons by program beneficiaries.

3. Whether this Court should overrule its decision in *Hans* v. *Louisiana,* 134 U.S. 1 (1890).

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. a. Congress established the "food stamp program * * * [in order to] permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. 2011. As administered by the Secretary of Agriculture, the program makes food stamp coupons available to eligible individuals or households in a "participating State," namely, a State that agrees to "assume responsibility for the certification of applicant households and for the issuance of coupons and the control and accountability thereof." 7 U.S.C. 2020(a).

In order to participate in the program, the State must submit, and the Secretary must approve, a "plan of operation." 7 U.S.C. 2020(d). Among other requirements, an acceptable state plan must provide for "a fair hearing and a prompt determination" of claimants' grievances, 7 U.S.C. 2020(e)(10), including a mechanism for the "prompt" restoration of wrongfully withheld food stamp coupons, 7 U.S.C. 2020(e)(11).[1]

As directed by statute, 7 U.S.C. 2014(b), the Secretary has promulgated "uniform national standards" for determining both a household's eligibility for and allotment of food stamp coupons. Those determinations are based on the household's financial means, *i.e.*, the household's "resources and income." See 7 C.F.R. Pt. 273; see also 7 U.S.C. 2013(c). Specific regulations govern the treatment of various items as falling within the maximum allowable levels of "resources" and "income." See 7 C.F.R. 273.8, 273.9. Households that exceed those levels in a particular period are therefore subject to reduced allotments of food stamps.[2]

b. Michigan, like every other State, participates in the food stamp program and has designated the Michigan Department of Social Services (MDSS) as the administering state agency. See Mich. Comp. Laws § 400.10 (1988). The MDSS, in compliance

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[1] The statute, however, specifically provides that food stamp coupon "allotments shall not be restored for any period of time more than one year prior to the date the state agency receives a request for such restoration from a household or the state agency is notified or otherwise discovers that a loss to a household has occurred." 7 U.S.C. 2020(e)(11).

[2] Food stamp coupons are obligations of the United States, "redeemable at face value by the Secretary through the facilities of the Treasury of the United States." 7 U.S.C. 2013(a); see also 7 U.S.C. 2019. Under the federal food stamp program, participating States distribute food stamps directly to eligible households. The coupons, nevertheless, remain the property of the United States until the States distribute them to those households. And the participating States, as custodians of the undistributed food stamps, are strictly liable to the Secretary for any losses that might occur before distribution. *E.g.*, *Louisiana* v. *Block*, 694 F.2d 430 (5th Cir. 1982); see 7 C.F.R. 271.4(a)(2).

The United States alone funds the food stamp benefits. The participating States and the federal government, however, share equally the administrative costs of each State's program. 7 U.S.C. 2025(a).

with federal law, see, *e.g.*, 7 U.S.C. 2020(e), has adopted procedures to handle claims of erroneous food stamp allotments. The MDSS provides "a fair hearing of appeals and complaints, when requested in writing by an applicant for or recipient of [food stamp coupons]." Mich. Comp. Laws § 400.9(1) (1988). If the MDSS (or a reviewing state court) determines that the agency was responsible for the incorrect allotment, the claimant is entitled to receive "supplemental food stamp issuances" to correct any error.[3]

2. During 1984, petitioner Patricia Cotton, a Michigan resident, received public assistance benefits under both the Aid to Families with Dependent Children (AFDC) program, 42 U.S.C 601 *et seq.*, and the food stamp program. Pet. App. 2, 19. Although entitled to a monthy AFDC "shelter allowance," petitioner did not receive her allowance for February 1984. The error was soon corrected and petitioner received "a supplemental public assistance payment in May of 1984 to correct the February underpayment." *Id.* at 20. When the MDSS calculated petitioner's July 1984 food stamp allotment, however, the agency "counted this retroactive shelter allowance as extra income thereby reducing [that allotment]." *Id.* at 2.

The MDSS continued that practice until December 1984. At that time, and in response to changes in federal law,[4] the MDSS

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[3] See Michigan Department of Social Services, Program Administrative Manual—Supplemental Food Stamp Benefits 1-7 (1988). In Michigan, food stamp recipients may seek judicial review of adverse MDSS administrative decisions in state court. See Mich. Comp. Laws § 600.631 (1981); *Hardges* v. *Department of Social Services*, 177 Mich. App. 698, 442 N.W.2d 752 (1989). Under state law, state courts may order the agency to award erroneously withheld public assistance benefits. See, *e.g.*, *Bulla* v. *Department of Social Services*, 159 Mich. App. 665, 406 N.W.2d 908 (1987).

[4] In May 1984, the Secretary of Agriculture amended the food stamp regulations to provide that "corrective [public assistance benefits] payments were to be counted prospectively or retrospectively depending on what they were for." Pet. App. 3; see 7 C.F.R. 273.21(j)(1)(vii)(B). A comment accompanying that regulation stated that "retroactive payments intended to meet the needs in one or more previous months must be excluded as income pursuant to 7 C.F.R. § 273.90(c)(8)." Pet. App. 3.

In August 1984, the federal government issued a clarification of that regulation to all participating States, including Michigan. See Food Stamp Program

abandoned its policy and began counting "non-recurring lump sum payments" as "resources rather than income." Pet. App. 18. Under this regime, such payments would no longer reduce a household's monthly food stamp allotment.

3. In February 1985, petitioner brought suit in the district court,[5] naming respondent, the Director of the MDSS as defendant, and challenging the failure of the MDSS to change its policy until December 1984 and its refusal to restore previously withheld food stamps.[6] Petitioner alleged that the MDSS's method of treating corrective public assistance payments for purposes of calculating food stamp allotments, during the period March 1, 1984 to December 1, 1984, violated the Food Stamp Act and applicable federal regulations. Pet. App. 4, 21; see Complaint, *Cotton* v. *Mansour,* No. 85 CV 40068 FL (E.D. Mich.) (filed Feb. 15, 1985), at 4-5.

Petitioner sought declaratory and injunctive relief on behalf of herself and other similarly situated Michigan food stamp recipients, including an order requiring the MDSS "to pay

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Policy Memo—Retroactive and Restored Lump-Sum Payments, Index No. 84-97, attached as Exhibit F to Pet. Mot. for Summary Judgment, *Cotton* v. *Mansour,* No. 85 CV 40068 FL (E.D. Mich.) (filed May 10, 1985). That memorandum explained that "retroactive [public assistance benefits] restored for prior months [are] disregarded as • • • non-recurring lump-sum payment[s] regardless of the source of the payment[s]." See also Pet. App. 3, 21.

[5] Petitioner's counsel had contacted the MDSS in order to resolve the dispute over the proper treatment of food stamp recipients in petitioner's circumstances. In November 1984, the MDSS notified petitioner's counsel that it had agreed to change its policy effective December 1, 1984. But the MDSS rejected counsel's request to issue supplemental food stamp coupons to those individuals, like petitioner, who were adversely affected under the prior policy. See Letter from Agnes M. Mansour, Director of the MDSS, to Terri L. Stangl, Esquire (Nov. 12, 1984), attached as Exhibit B to Resp. Mem. in Support of Mot. for Summary Judgment, *Cotton* v. *Mansour,* No. 85 CV 40068 FL (E.D. Mich.) (filed May 8, 1985).

[6] The complaint alleged claims against respondent's predecessor, Agnes Mansour, "personally and in her official capacity as Director of MDSS." Pet. App. 21. The district court dismissed the complaint to the extent it sought relief against Mansour in her individual capacity. *Id.* at 13-15. Petitioner sought no further review of that aspect of the district court's judgment. See *id.* at 22.

members of the class any and all food stamps due them" and an order requiring the MDSS "to notify all persons whose food stamps were unlawfully reduced due to receipt of a supplemental payment that they may be entitled to additional food stamps, and of the administrative procedures available to them." Complaint, *supra*, at 5; see Pet. App. 5, 18.

4. On cross-motions for summary judgment,[7] the district court, in April 1986, dismissed as moot petitioner's claims for a declaratory judgment and prospective injunctive relief, because the MDSS had voluntarily changed its policy effective December 1, 1984. Pet. App. 4-5. However, the court rejected the MDSS's argument that the Eleventh Amendment barred petitioner's claims for "retroactive relief." *Id.* at 5. The court reasoned that since the federal government fully funds the food stamp program, "ordering the state to arrange for wrongfully withheld benefits will not * * * violate the Eleventh Amendment." *Id.* at 8. And, to the extent the State would bear "administrative costs associated with notice," *ibid.*, the court likened those costs to "costs of arranging for retroactive payments," which "do[ ] not involve the Eleventh Amendment," *id.* at 9.[8]

5. The court of appeals reversed, holding that the Eleventh Amendment bars federal court jurisdiction over petitioner's claims. Pet. App. 17-36.[9] The court of appeals recognized that

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[7] The MDSS stipulated, in connection with the court's resolution of its motion for summary judgment, that its prior policy had reduced petitioner's allotment of food stamp coupons. See Resp. Mem. in Support of Mot. for Summary Judgment, *supra*, at 1-2; Pet. App. 4 n.3. The MDSS contended, among other things, that the Eleventh Amendment barred petitioner's claims for retrospective relief. See Resp. Mem. in Support of Mot. for Summary Judgment, *supra*, at 8-13.

[8] In light of its holding, the court did not address petitioner's alternative argument that "Congress abrogated the state's immunity with respect to the administrative costs for restoring lost food stamps." Pet. App. 13 n.11. The court later certified the case as a class action. *Id.* at 41-42.

[9] The court of appeals agreed with the district court that petitioner's claim for prospective injunctive relief was moot. Pet. App. 23. Petitioner has not challenged that ruling in this Court.

the Eleventh Amendment, as construed in this Court's decisions,[10] generally prohibits federal courts from entertaining citizens' suits against States. Those decisions, however, have drawn the distinction between "prospective and retrospective relief." *Id.* at 22. As the Court has explained that distinction:

> [P]rospective relief authorized by [*Ex parte Young*, 209 U.S. 123 (1908)] has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. * * * But we [have] declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, * * * an award of retroactive relief necessarily falls afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

Id. at 27-28 (quoting *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984) (citations and internal quotation marks omitted)).

Under these governing principles, the court of appeals concluded, the Eleventh Amendment barred petitioner's claim for a retroactive award of food stamps. And the court declined to carve out an exception where, as here, the State does not itself pay for the unissued food stamps. Pet. App. 23-31. The court concluded that the Eleventh Amendment also barred petitioner's claim for notice relief. *Id.* at 31-33. The court observed that "[t]here is therefore no * * * appropriate prospective relief to which notice relief could be ancillary," *id.* at 31, the necessary predicate to allowing such relief under this Court's decision in *Green* v. *Mansour*, 474 U.S. 64, 71 (1985). Consequently, the court found "this case indistinguishable from *Green* and conclude[d] that the 'notice relief' requested is barred by the eleventh amendment." Pet. App. 33.

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[10] *E.g.*, *Green* v. *Mansour*, 474 U.S. 64 (1985); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908).

Lastly, to the extent the district court's order awarded declaratory relief, the court of appeals concluded that *Green* v. *Mansour, supra,* also precluded that sort of relief under the Eleventh Amendment. Pet. App. 33-35. The court therefore rejected petitioner's "request for a declaratory judgment that [the MDSS's] past method of calculating food stamp eligibility between May 1, 1984 and December 1, 1984 was unlawful." *Id.* at 35.

6. On rehearing, petitioner contended that Congress had abrogated the State's Eleventh Amendment immunity by specific provisions of the Food Stamp Act,[11] and, in the alternative, that the State had waived its immunity by participating in the food stamp program. See Pet. C.A. Reh'g Br. 11-13.

In March 1989, the court of appeals denied the petition for rehearing and suggestion of rehearing en banc. Pet. App. 37-38. In an accompanying order, the court concluded that it was

> not persuaded that Congress, in the enactment of the Food Stamp Act, expressed an intention to abrogate the Eleventh Amendment in unmistakable language in the Act itself, nor has the state of Michigan, by its participation in the food stamp program and its adoption of a plan of operation, specifically waived its immunity to suit in federal court.

Id. at 38 (citing *Atascadero State Hosp.* v. *Scanlon,* 473 U.S. 284 (1984)).

DISCUSSION

This case appears to raise a substantial issue that this Court has not specifically addressed, namely whether the Eleventh Amendment bars federal court jurisdiction over a citizen's action against a state official seeking retrospective relief that will be funded, except for a portion of the associated administrative expenses, by

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[11] Petitioner cited 7 U.S.C. 2020(e)(11), which requires States under certain circumstances to award supplemental allotments of food stamp coupons, see note 1, *supra,* and 7 U.S.C. 2023(b), which provides in pertinent part that

> [i]n any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments * * *.

the federal government rather than by the State itself. Although there does not appear to be a square conflict among the circuits on this issue, there is considerable tension among lower court opinions regarding its proper resolution. On the other hand, the Sixth Circuit appears to have resolved the issue in a manner consistent with this Court's decisions explicating the meaning of the Eleventh Amendment. The Court has consistently drawn the distinction between permissible prospective and impermissible retrospective relief, and action here clearly seeks a form of retrospective relief. Similarly, it appears that the court of appeals, in determining whether Congress intended to abrogate the Eleventh Amendment immunity of a State that accepts federal funds under the Food Stamp Act, 7 U.S.C. 2011 *et seq.*, properly applied the exacting standard established by this Court. By virtue of the lack of any clear indication that the decision below is incorrect, and absent any direct conflict in the lower courts or any indication that the decision will undermine participating States' compliance with the federal food stamp program, we do not believe that review is necessary in this case.

A. 1. Petitioner contends (Pet. 10-18) that the Eleventh Amendment does not bar her federal court action seeking recovery of food stamp coupons and the issuance of notice to affected households from the Michigan official responsible for withholding those coupons. This Court has long held that "[b]ecause of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Mansour*, 474 U.S. at 68.[12] At the same time, however, the Court has carved out an important exception to this general principle: a suit challenging the constitutionality of a state official's action is not

[12] See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 237-240 (1985); *Pennhurst*, 465 U.S. at 97-106; *Quern* v. *Jordan*, 440 U.S. 332, 337, 347-349 (1979); *Edelman*, 415 U.S. at 662-668; *Ex parte Young*, 209 U.S. at 155-160; see also *Dellmuth* v. *Muth*, 109 S. Ct. 2397 (1989); *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989); *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

one against the State, and thus is not barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908). As the Court has explained, "[t]he theory of *Young* was that an unconstitutional statute is void, * * * and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.' " *Mansour*, 474 U.S. at 68 (quoting *Ex parte Young*, 209 U.S. at 160)); see *Pennhurst*, 465 U.S. at 102-103. Consequently, the Court has held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law by state officials. See *Ex parte Young*, 209 U.S. at 155-156, 159.

At the same time, the Court has declined to give *Ex parte Young* an "expansive interpretation." *Pennhurst*, 465 U.S. at 102. Thus, for example, in *Edelman* v. *Jordan*, 415 U.S. 651, 666-668 (1974), the Court concluded that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. In particular, the Court held that although a federal court may issue an injunction that governs the state official's future conduct, the court may not enter an injunction that awards retrospective monetary relief. *Id.* at 668-669. Then, again, in *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979), the Court reiterated that "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." The Court, accordingly, upheld the class notice order at issue as "fall[ing] on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side," *id.* at 347, where that notice was "properly viewed as ancillary to the prospective relief already ordered by the court," *id.* at 349.[13]

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[13] The Court also pointed out the de minimis effect of the lower court's decree:

> The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue. [Defendant State] raises no objection to the expense of

In *Green* v. *Mansour, supra,* this Court further clarified the narrow exception represented by *Ex parte Young*. The Court explained that

> [b]oth prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in ensuring the supremacy of that law. * * * But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

474 U.S. at 68.

In that case, Michigan AFDC recipients sought a federal court order declaring that state officials' prior method of calculating AFDC benefits violated federal law and notifying class members of the availability of administrative remedies. 474 U.S. at 65-67.[14] This Court concluded that the Eleventh Amendment barred the request for injunctive relief:

> [T]he award of a declaratory judgment * * * would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.

Id. at 73. The Court thus held that retrospective injunctive relief "is not available when the result would be a partial 'end run'

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preparing or sending it. The class members are "given no more * * * than what they would have gathered by sitting in the courtroom."

Quern, 440 U.S. at 349 (quoting *Jordan* v. *Trainor,* 563 F.2d 873, 877-878 (7th Cir. 1977)).

[14] In that case, as here, plaintiffs did not claim that state officials were continuing to violate federal law. There, as in this case, state officials had conformed their practices to federal law by the time suit was filed. See *Mansour,* 474 U.S. at 66.

around our decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974)." *Ibid.*[15]

In sum, this Court's decisions have "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. And the Court has recognized that the "distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States." *Id.* at 106.

2. In this case, petitioner does not dispute that she is seeking retrospective relief, *i.e.*, a declaratory judgment that respondent had violated the Food Stamp Act and an order requiring respondent to issue previously withheld food stamps. Settled principles therefore support the court of appeals' conclusion that the Eleventh Amendment bars federal jurisdiction over such claims. Indeed, petitioner is seeking relief analogous to the relief requested in *Green* v. *Mansour*, *supra*. Like that case, "[t]here is a dispute about the lawfulness of respondent's past actions." 474 U.S. at 73.[16] Although petitioner requested restoration of previously withheld food stamps, she also sought a declaratory judgment. But as the Court observed in *Mansour*,

> the award of a declaratory judgment in this situation would be useful in resolving the dispute * * * only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed.

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[15] Similarly, the Court concluded that "[b]ecause 'notice relief' is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief." 474 U.S. at 71. The Court therefore held that the Eleventh Amendment barred plaintiffs' request for notice relief, because such an order in that particular case would not be "ancillary to a judgment awarding valid prospective relief." *Ibid.*

[16] See Resp. Br. in Opp. 4-5; Letter from Agnes M. Mansour, Director of the MDSS, to Terri L. Stangl, Esquire (Nov. 12, 1984) ("[T]he [MDSS] was not in error in treating the supplemental warrants as income. Due to the fact that the [MDSS] was not in error, we have no legal basis for processing restorations in the cases affected by the previous policy."), attached as Exhibit B to Resp. Mem. in Support of Mot. for Summary Judgment, *supra*; see also note 7, *supra*.

Ibid. The court of appeals rejected petitioner's invitation to hand down a similar ruling that might likewise have resulted in an "end run" around this Court's decisions in cases such as *Mansour, Quern,* and *Edelman.*

Petitioner seeks to distinguish this case from *Mansour,* and also take it outside the purview of the distinction drawn in decisions such as *Edelman* and *Quern,* on the ground that the principal relief sought will be paid with federal, as opposed to state, funds. See, *e.g.,* Pet. 12-14. To be sure, unlike the AFDC program in *Mansour,* the federal government fully funds food stamp coupons. Therefore, any court order requiring the State to issue additional coupons will not result in the State's paying for those coupons. On the other hand, the State will certainly share the administrative costs of distributing those coupons and will bear entirely the costs of complying with any court order. See note 2, *supra.*

None of this Court's decisions construing the Eleventh Amendment has specifically considered the distinction drawn by petitioner. Nevertheless, the Court has consistently determined that the Eleventh Amendment applies to actions in federal court seeking retroactive relief from a State; moreover, the Court's decisions do not draw distinctions based on the ultimate source of funds necessary to provide such relief. See, *e.g., Mansour,* 474 U.S. at 73; *Quern,* 440 U.S. at 337; *Edelman,* 415 U.S. at 668-669; see also *Pennhurst,* 465 U.S. at 102-106. The decision of the court of appeals therefore comports with the general principles enunciated in this Court's Eleventh Amendment cases.

3. a. There is considerable tension among the circuits on the issue whether the Eleventh Amendment bars federal court jurisdiction over the sort of relief sought in this case. In *Colbeth* v. *Wilson,* 554 F. Supp. 539 (D. Vt. 1982), aff'd, 707 F.2d 57 (2d Cir. 1983), for example, the district court, in accord with the decision below, concluded that court-ordered "recalculation and restitution of food stamp benefits falls on the *Edelman,* rather than *Ex parte Young,* side of the Eleventh Amendment law," 554 F. Supp. at 545. On the other hand, decisions in the First and Third Circuits contain statements directly contrary to the view adopted by the Sixth Circuit in this case.

In *Bennett* v. *White*, 865 F.2d 1395 (3d Cir.), cert. denied, 109 S. Ct. 3247 (1989), plaintiffs challenged the manner in which Pennsylvania state officials were administering the child support enforcement program under Subchapter IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.* (Supp. V 1987). The court of appeals upheld the district court's finding that defendant state officials were continuing to violate federal law. See 865 F.2d at 1400-1402. Turning to the district court's remedial order, the court concluded that the Eleventh Amendment did not bar an order requiring the Pennsylvania Department of Public Welfare to "audit its records in order to identify [potential] class members to whom notice of a potential recovery in state courts could be sent." *Id.* at 1407.[17] In so ruling, the court rejected plaintiffs' contention that the Eleventh Amendment had no bearing on the case because "they are not seeking the recovery of entitlements to government benefits funded by general revenues, but only the recovery of their own property." *Ibid.* In the court's view, *Edelman* "prevents a federal court from requiring state officers to disgorge from the state treasury even unlawfully converted property, at least so long as the state pays for the disgorgement." *Id.* at 1408. Nevertheless, the court of appeals also agreed with plaintiffs that the district court "should have ordered retroactive relief against the DPW at least to the extent that DPW will be reimbursed by the United States." *Ibid.*[18] The court concluded that the Eleventh Amendment did not bar that sort of relief, "when such relief will be at the expense of the federal government, not the state." *Ibid.*

In *Robinson* v. *Block*, 869 F.2d 202 (3d Cir. 1989), the court of appeals concluded that Pennsylvania state officials were applying an "irrebuttable presumption that siblings who live at the same address in fact live together and therefore constitute one household, in violation [of the Food Stamp Act]." *Id.* at 204. As a result, the court of appeals remanded for entry of an order requiring the state defendants to "make any necessary adjustments

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[17] The state officials did not challenge that part of the district court's remedial order requiring them to refund miscalculated benefits to the class members. See 865 F.2d at 1405.

[18] Under the circumstances of that case, "decreases in child support payments retained by the state will result in increases in federal AFDC payments in the next quarter, in an amount about fifty percent of the decreases." 865 F.2d at 1408.

in the allotment of food stamps, including providing retroactive benefits and refraining from alleging overissuances of food stamps, to siblings who can show that they do not or did not live together." *Id.* at 214. Although the court of appeals noted in passing that "[i]nasmuch as the food stamp program is federally funded, * * * the eleventh amendment is not a bar to [plaintiff] attempting to obtain retroactive benefits," *id.* at 214 n.11 (citing *Bennett*, 865 F.2d at 1408), the court earlier in its opinion had also made plain that the State voluntarily agreed to provide retroactive benefits, see 869 F.2d at 209 & n.7.

And in *Foggs* v. *Block*, 722 F.2d 933, 937-940 (1983), rev'd on other grounds *sub nom. Atkins* v. *Parker*, 472 U.S. 115 (1985), the First Circuit upheld the district court's ruling that state officials had reduced plaintiffs' food stamp benefits in violation of federal law. The State challenged the district court's remedial order requiring it to restore previously withheld food stamps to all food stamp recipients in Massachusetts. The State contended both that the Eleventh Amendment barred such an order and, in the alternative, that the court should order it to restore benefits only to a narrowly defined class of food stamp recipients. *Id.* at 941 & n.6. In vacating the district court's "wide ranging" remedial order, *id.* at 940, the court of appeals rejected the State's immunity argument, stating that "[s]ince the cost of the food stamp program is borne by the federal government, we see no Eleventh Amendment bar to ordering the restoration of benefits," *id.* at 941 n.6. Nevertheless, the court accepted the State's alternative proposed remedy, and accordingly ordered state officials to review their files in order to identify the limited category of recipients entitled to receive additional benefits. *Id.* at 941.[19]

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[19] See also *Klaips* v. *Bergland*, 715 F.2d 477, 485 n.16 (10th Cir. 1983) (expressly reserving decision on the question whether the Eleventh Amendment bars an order requiring a State to award retroactive food stamp benefits); *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-1022 (S.D.N.Y. 1979) (assuming, without deciding, that the Eleventh Amendment would not bar an order requiring a State to award retroactive food stamp benefits), aff'd on other grounds, 639 F.2d 768 (2d Cir. 1980).

Petitioner errs in claiming (Pet. 14) that *Lynch* v. *Lyng*, 872 F.2d 718 (6th Cir. 1989), and *Metzger* v. *Lyng*, 864 F.2d 75 (8th Cir. 1989), conflict with the decisions below. Neither of those decisions suggests, let alone addresses, the issue of whether a court may order the State to award retroactive food stamp benefits consistently with the Eleventh Amendment.

b. Nevertheless, each of the foregoing decisions may be distinguished from this case. In the Third Circuit's *Bennett* decision, the court-ordered relief was predicated on the defendants' continuing violation of federal law. Here, however, that essential predicate is missing. Moreover, the state officials in *Bennett* did not squarely challenge the courts' authority to order retroactive relief. Indeed, they agreed to refund miscalculated benefits to plaintiff class members. See note 17, *supra*. Here, respondent has made no such concession. Finally, since the court of appeals' decision in *Bennett* remanded the case for the district court to fashion an appropriate remedial order, the record is unclear whether the court of appeals' ruling had any practical effect.[20]

Similarly, the Third Circuit's statement addressing the Eleventh Amendment in *Robinson* should be treated as dictum, because the State had waived its immunity. The First Circuit's *Foggs* decision comes the closest to conflicting directly with the decision below. But even *Foggs* can be distinguished as involving a situation where the State, by its alternative argument, had effectively waived its immunity. Thus, although the lower court decisions are in considerable tension, it appears that there is no square conflict at this time.

c. The disagreements among the lower courts discussed above may also be viewed as part of a broader controversy among the circuits over whether the Eleventh Amendment bars retroactive relief against the State where the relief will not be funded solely by the State's general or tax revenues. See *Porcher* v. *Brown*, 459 U.S. 1150, 1153 (1983) (White, J., joined by Powell and Rehnquist, JJ., dissenting from denial of certiorari). In *Esparza* v. *Valdez*, 862 F.2d 788 (10th Cir. 1988), cert. denied, 109 S. Ct. 3214-3215 (1989), for example, the court of appeals concluded that the Eleventh Amendment prohibits a federal court from ordering the State to pay retroactive relief out of the State's unemployment compensation fund, where that fund "was separately financed by employer contributions, federal funding, investment income, and other receipts, and

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[20] The court of appeals acknowledged that "absent an accounting, we do not know the exact amounts involved." 865 F.2d at 1408. Compare *Quern*, 440 U.S. at 349; see note 13, *supra*.

* * * the state was insulated from liability for amounts exceeding the resources of the fund," 862 F.2d at 795 (citation and internal quotation marks omitted). On the other hand, in *Brown* v. *Porcher,* 660 F.2d 1001, 1007 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), overruled on other grounds *sub nom. Wimberly* v. *Labor & Indus. Relations Comm'n,* 479 U.S. 511 (1987), the court of appeals held that the Eleventh Amendment does not bar a federal court from ordering the State to pay retroactive relief out a similar unemployment compensation fund. Accord *Almond* v. *Broyles,* 612 F. Supp. 223, 227-228 (E.D.N.C. 1985), aff'd in part and vacated in part on other grounds, 792 F.2d 451 (4th Cir. 1986), cert. denied, 479 U.S. 1091 (1987); see also *Blake* v. *Kline,* 612 F.2d 718, 723-724 (3d Cir. 1979), cert. denied, 447 U.S. 921 (1980).

That controversy, however, need not be resolved by the Court at this time. First, those decisions rejecting the State's claim to Eleventh Amendment immunity generally predate this Court's decisions in *Mansour* and *Pennhurst*; accordingly, their continued significance remains in doubt. Second, this particular case may be an unsuitable vehicle for resolving that broader disagreement, where the relief sought, excluding associated administrative costs, would be paid entirely by federal, as opposed to state, funds. Should the Court accept petitioner's submission that the Eleventh Amendment does not apply to an action seeking the return of wrongfully withheld federal benefits (where those benefits are fully funded by the federal government), it would not have occasion to reach the broader question involving other sorts of "mixed" funding schemes.

4. Also militating against review is the fact that application of the Eleventh Amendment here does not appear to jeopardize the federal objective of ensuring that participating States comply with the food stamp program. First, the federal government, through the Food and Nutrition Service, has established an elaborate "Performance Reporting System" that identifies program errors and deficiencies, and provides financial incentives for States to reduce such problems. See 7 C.F.R. Pt. 275. Second, the United States remains free to bring actions against participating States that do not meet their statutory obligations

under the Food Stamp Act. Third, with regard to specific instances of alleged violations of the Act, individual food stamp recipients may bring federal court actions that challenge ongoing state practices and policies, and if successful, may obtain prospective injunctive relief, including *Quern*-type notice relief. See, *e.g.*, *Gonzales* v. *Pingree*, 821 F.2d 1526 (11th Cir. 1987); *Victorian* v. *Miller*, 813 F.2d 718 (5th Cir. 1987). Lastly, food stamp recipients may resort to state court to obtain retrospective relief that may be unavailable in federal court, including recovery of wrongfully withheld food stamp coupons. See note 3, *supra*. For these reasons, petitioner errs in suggesting (Pet. 12) that further review of the disputed issues in this case is warranted in order for the federal government properly to police States' compliance wth the food stamp program.

B. 1. Petitioner also contends (Pet. 19-21) that even if the Eleventh Amendment would otherwise preclude a federal court from granting the relief she seeks, Congress abrogated any such immunity when it enacted the Food Stamp Act. Specifically, petitioner relies on two provisions of the statute: 7 U.S.C. 2020(e)(11), which requires each State that participates in the food stamp program to include in its plan of operation a provision for "the prompt restoration in the form of coupons" of any allotment of food stamp coupons wrongfully withheld or terminated; and 7 U.S.C. 2023(b), which provides that "any judicial action" seeking restoration of wrongfully withheld coupons or judicial review of a state agency determination regarding termination of coupons must be commenced within one year of the alleged wrongful denial or the request with the State for restoration. See notes 1, 11, *supra*. In our view, however, neither provision contains the requisite unequivocal expression of congressional intent to abrogate state sovereign immunity from suit in federal court.

2. In *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989), five Justices of this Court concluded that Congress has power under Article I of the Constitution to abrogate the Eleventh Amendment immunity of the States. See *id.* at 2280-2286 (opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *id.* at 2295 (opinion of White, J.). All Members of

the Court appeared to agree, however, that any such power on the part of Congress may be exercised only by the most "unmistakably clear" language. *Id.* at 2277 (opinion of the Court), quoting *Atascadero,* 473 U.S. at 242; 109 S. Ct. at 2289 (opinion of White, J., joined by Rehnquist, C.J., and by O'Connor and Kennedy, JJ.); *id.* at 2295 (Scalia, J., concurring). Indeed, this Court has consistently required that Congress "unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." *Atascadero,* 473 U.S. at 242.

This manifestation of congressional intent is not to be inferred from context or legislative history; rather, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero,* 473 U.S. at 243. The Court has applied this exacting standard not only when Congress has legislated under Section 5 of the Fourteenth Amendment, see *Atascadero,* 473 U.S. at 242-243; *Pennhurst,* 465 U.S. at 99; *Quern,* 440 U.S. at 342, but also when Congress has abrogated state sovereign immunity under its Article I powers, see *Pennsylvania Union Gas Co., supra* (Commerce Clause); *Hoffman* v. *Connecticut Dep't of Income Maintenance,* 109 S. Ct. 2818 (1989) (Bankruptcy Clause).

3. In our view, the statutory language cited by petitioner does not satisfy the Court's demanding test for congressional abrogation. The first provision, 7 U.S.C. 2020(e)(11), does not even mention a judicial action against the State, let alone an action in federal court. It merely states that a state plan of operation must provide for prompt restoration of food stamp coupons wrongfully denied or terminated. See note 1, *supra.* That requirement could readily be fulfilled by a provision for state administrative or judicial proceedings allowing persons to seek restoration of coupons, without any need for recourse to federal court. In fact, Michigan has adopted just such provisions. See pp. 2-3 and note 3, *supra.*[21]

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[21] We note further in this regard that the AFDC statute at issue in *Green* v. *Mansour, supra,* contains a provision, 42 U.S.C. 602(a)(22), which parallels the plan requirements set forth in 7 U.S.C. 2020(e)(11). Yet there was no sug-

Petitioner also relies on 7 U.S.C. 2023(b). This provision at least makes reference to a "judicial action." But it is in the nature of a limitations provision, requiring that any judicial action brought to recover food stamp coupons wrongfully denied or terminated must be brought within one year of the denial, or within one year of any request for restoration. See note 11, *supra*. As such, it cannot confer jurisdiction on any court to hear a complaint against a State for restoration of coupons. Any such jurisdiction would have to be created by the States under 7 U.S.C. 2020(e)(11), and the States would of course have authority only to confer jurisdiction on *state* courts.

Moreover, even if it could be said that 7 U.S.C. 2023(b) at least acknowledges the availability of judicial review of state agency action, cf. *Union Gas*, 109 S. Ct. at 2278-2279 (statutory provision exempting States from certain types of liability implicitly acknowledges that they would otherwise be liable), it nevertheless cannot be said that this provision by its terms contemplates judicial review by a *federal* court. It is significant in this regard that the subsection of the statute immediately preceding Section 2023(b)—7 U.S.C. 2023(a)—expressly contemplates judicial review by *either* a federal district court or a state court. This provision, however, is limited by its terms to requests for judicial review by retail food stores, wholesale food concerns, and state agencies; it does not include requests for judicial review by beneficiaries. If Congress had intended to abrogate state sovereign immunity with respect to the beneficiary suits referenced in the next subsection—subsection (b)—it would be natural for Congress to have made some reference to federal district courts in that subsection as well. That it did not, and instead referred only generically to "any judicial action," supports the conclusion that no abrogation of Eleventh Amendment immunity was clearly expressed.

C. Finally, petitioner suggests (Pet. i, 21-23) that the Court grant review in order to consider whether *Hans* v. *Louisiana*, 134 U.S. 1 (1890), should be overruled. In *Union Gas*, which

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gestion in *Mansour* that the presence of such a provision meant that Congress had abrogated the State's sovereign immunity.

was decided after the petition was filed, five Members of the Court indicated their view that *Hans* should not be overruled. See 109 S. Ct. at 2295 n. 8 (opinion of White, J.); *id.* at 2299-2302 (opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor and Kennedy, JJ.); compare *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987). The debate over the continuing vitality of *Hans* in *Union Gas* occurred against the backdrop of a congressional enactment that five Justices concluded *did* expressly abrogate Eleventh Amendment immunity. If five Justices were unwilling to conclude in that context that *Hans* should be overruled, then it is unlikely that the Court would reach a different conclusion where, as we believe to be the case here, Congress has *not* clearly abrogated the State's sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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